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In the Supreme Court of the United States

OCTOBER TERM 1997

TOMMY L. SWANSON,
Petitioner

v.

GENERAL SERVICES ADMINISTRATION,
Roger W. Johnson, Administrator
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Does the decision below conflict with this Court's decision in *St. Mary's Honor Center v. Hicks*?

2) Does the decision below conflict with the Fifth Circuit standard for testing jury verdicts?

3) Did the evidence support the jury verdict finding of discrimination or retaliation in agency's treatment of black employee's tardiness?

4) Did the evidence support the jury verdict finding of discrimination or retaliation in the agency's failure to provide parking space in building to black employee?

5) Did the evidence support the jury verdict finding of discrimination or retaliation in agency's treatment of black employee when the agency directed reassignment of employee?

6) Did the evidence support the jury verdict finding of discrimination or retaliation in agency's elimination of black employee's supervisory authority?

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PETITION FOR WRIT OF CERTIORARI

Tommy L. Swanson ("Swanson") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 24, 1997, in order to resolve the conflict between the judicial and legislative branches of the federal government, regarding the right to a jury trial in a Title VII case. The appellate judges denied a jury trial verdict to an employee in a Title VII case (which right to jury trial was specifically provided for in the Civil Rights Act of 1991), when there is sufficient evidence to support the jury verdict.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is *Tommy L. Swanson v. GSA*, reported at 110 F3d 1180 (5th Cir., 1997). It is reprinted in Appendix A hereto at page A-1.

JURISDICTION

On April 24, 1997, the Fifth Circuit issued its opinion in *Tommy L. Swanson v. GSA*, cited above. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the issuing of the opinion.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED IN THIS CASE

The Civil Rights Act of 1991 provides that jury trials are available under Title VII where the claim is for intentional discrimination and relief for compensatory damages is demanded. More specifically, Section 102 of Public Law No. 102-166 (The Civil Rights Act of 1991) adds "Section 1977A. Damages in Cases of Intentional Discrimination in Employment", which provides in paragraph (c)(1) that any party seeking compensatory or punitive damages under this section may demand a trial by jury. (Punitive damages were not sought and are not allowed against the federal government, but compensatory damages were sought in this case.) The appropriate excerpts of the Civil Rights Act of 1991 are reprinted in Appendix D hereto.

STATEMENT OF THE CASE

Swanson is an African American citizen of the United States. Swanson was hired by the GSA as a mechanic in 1973. He received several promotions and then in 1982, Swanson was selected for an internship as a Building Management Specialist. In 1985, he was promoted and transferred to a Little Rock, Arkansas position of Building Management Specialist GS-11. In Little Rock Swanson was a building manager and supervised as many as 25 people.

Swanson was selected for the position of Supervisory Building Specialist in the New Orleans Field Support Center and assumed this position in October, 1988. His position when he arrived in New Orleans was the Chief of the Real Property Management and Safety Branch. He was promoted to a GS-12 upon his arrival in New Orleans. He held the

position of Branch Chief from October of 1988 until January of 1990, a total of approximately 15 months, when Swanson's position as a branch chief was taken from him. Swanson was told that his new position had career advancement opportunities, but soon after arriving in New Orleans, his title of Branch Chief was removed.

According to Swanson's Job Description (Appendix F), Swanson was supposed to exercise direct supervision over one Building Management Specialist, one Computer Programmer, two Physical Security personnel, and one Budget Clerk. Although, Swanson was assigned early in his tenure in New Orleans all of these support staff except a computer programmer, all of these support personnel were eventually removed from Swanson's supervision except Debra Mazant, the Budget Clerk, who is African American. All of Swanson's support staff except Ms. Mazant, were reassigned to white supervisors. Catalina Ferrara was reassigned to Moore and Tom Sarver; Alisa Ruth was reassigned to Ron Snow; Edie Snow was reassigned to Moore; Jada Freeman was reassigned to Moore. No white manager experienced all of his support staff being taken away in the manner that Swanson's staff was taken away. Also, Swanson was not allowed to supervise a white employee for longer than six months. Branch managers Pigg, Sarver, and Snow are white and all have administrative support, unlike Swanson.

Glenn Moore ("Moore") was Swanson's immediate supervisor for the entire time that Swanson was in New Orleans, Moore's title was Director of the New Orleans Support Facility until February 1991, and then he was the Real Property Officer for the New Orleans Enhanced Field Office. Moore segregated his employes by race. The Contracts

Branch was all white; the Real Estate Branch was all white except for an Indian and an African American student aide; most of the African Americans under Moore were in the custodial, maintenance or maintenance mechanical departments. Swanson's non-branch after the beginning of 1990 was an example of racial segregation. Swanson was not allowed to supervise white employees longer than six months. The employees that Swanson was allowed to supervise longer than six months were the two African American security guards and the African American budget assistant.

Swanson was discriminated against because of his race upon his arrival in New Orleans as the Supervisory Building Management Specialist, GS-12 when he asked for a parking space in the basement of the Hale Boggs Federal building and was denied this privilege.

White employees in similar management positions as Swanson were given parking spaces upon their arrival. Tom Sarver, white male, was a branch chief GS-12 when he arrived after Swanson in New Orleans and was given a parking space upon his arrival. Ed Wortmann, while male, was a branch chief GS-12 when he arrived after Swanson in New Orleans and was given a parking space upon his arrival. Swanson, the only African American branch manager GS-12, was the only branch manager denied a parking space in the building. Moore, Swanson's immediate supervisor in New Orleans, told Swanson that there were no parking spaces available. However, Ron Snow, Elvira Pigg, and Ed Wortmann were all white GS-12 branch chiefs who were given parking spaces after Swanson arrived in New Orleans. Snow and Wortmann were given parking spaces as G-12's, even though they had been a G-12's for a shorter time than

Swanson and Swanson had been on the job in New Orleans longer than they had.

The Memorandum from Moore to Swanson dated April 1, 1992 (Appendix M) shows even as late as that date Swanson was requesting and Moore was denying Swanson's request for parking in the basement of the Hale Boggs Building. Swanson had been requesting a Hale Boggs parking space since 1988, and Swanson not getting a parking space in the basement was a complaint in Swanson's first formal grievance based on race discrimination dated May 18, 1990. Not only does the April Fool's Day 1992 Memo state that Swanson is denied basement parking, it also states that the parking spaces that were then assigned to Elvira Pitt (GS-12) and Ed Wortmann (GS-12) were being withdrawn. This Memo idicates that the agency's representation to Swanson that there were no available parking spaces was false and a pretext for racial discrimination and retaliation.

In addition to the denial of parking privileges, Swanson was then downgraded in his performance evaluation while all similarly situated whites were being upgraded on their evaluations. This occurred even though, during the rating period, Swanson's branch out performed the other branches on an inspection by a team from the Regional Office. Swanson filed an EEO Complaint in May of 1990. Thereafter things got worse for Swanson. He was suspended for taping a conversation with his supervisor Moore and his boss Eschbacher. He was suspended for using government postage to send correspondence to the head of the Black Affairs Committee in Fort Worth, Texas.

The only other African American manager that Moore has supervised since Moore became Field Office Manager in

New Orleans was Lillie Andrews, who was a 16 year GSA employee. She was removed from federal service by Moore in 1987 after she had filed several EEO complaints against him. Ms. Andrews was a GS-11 Building manager from 1980 through 1987. Since Moore has been in New Orleans, there have been no proposed removals from federal service of any white employees.

Lillie Andrews, like Swanson, is a college educated African American. Ms. Andrews received a bachelor of science degree from Southern University in New Orleans in 1973, with a major in economics and a minor in business administration. Moore, on the other hand, did not graduate from high school. He received a GED and did some college work while in the Air Force, but he never received any degree. Moore attended grammar school and high school in Pitcairn, Pennsylvania and neither schools had any African American students.

Examples of the race discrimination experienced by Ms. Andrews while she was supervised by Moore were that she was not allowed to supervise any white employees; Moore took away a parking space from her that she had for several years and Moore did not take away the parking space of any white employees; and Moore gave her many infractions to respond to. Moore had a pattern and practice of discrimination against African American managers that he supervised.

Swanson was also discriminated against because of his race and reprisal when he was harassed on the job. He was harassed in several ways that the white GS-12's were not. He was required to type his own contracts. This is a substantial task, involving the typing of up to a third of a 200 page

document. Although white managers had secretarial support for this type of work, Moore removed Swanson's support.

After one occasion where Swanson wrote the word "damn" in a memo to a co-worker, Moore did not allow Swanson to communicate with anyone without the correspondence going through Moore. This restriction did not last for six months, as it was initially set up, but rather lasted for years and up until 1992, when Swanson was forced to move to Ft. Worth. The white managers did not have a similar restriction.

On or about May 16, 1990, Swanson's office cubicle was, in his absence and without his prior knowledge, surrounded by noisy computer printers, although no white manager was so situated. When he returned from annual leave he found that every accessible wall to his office had printers placed next to them and that wires connected to them ran over the walls and through his office. These printers were so noisy that when they were printing, Swanson could not hold a conversation in his office. Although Swanson complained about this to Moore immediately, nothing was done about it for approximately four months, until the day before the investigator arrived to investigate Swanson's first EEO complaint. Swanson works for GSA, and Moore's office is responsible for working with contractors to build out office space. If Moore had wanted the noisy printer problem solved in a timely fashion, it would have been quickly resolved.

On the other hand, Elvira Pigg determined the location of printers in her program area. She has only one noisy (dot-matrix) printer, it has a cover, and it is placed well outside her office, on the other side of a four-foot walkway.

Her dot-matrix printer had a sound-deadening cover on it from the day of its installation. The only time her printers were moved, she made the decision to move them; they were never moved without her knowledge and consent. Ron Snow has two noisy printers and two quiet ones; they are not located next to his office; in addition, when the printers arrived, it was Snow's decision and his alone as to where the printers were to go. Ed Wortmann has two printers; they are located at least twelve feet from his office.

Furthermore, Swanson's superiors in the chain of command, Casey Bowen and Earl Eschbacher, gave him no support at all in atempting to resolve difficulties. Calls to them were, in the case of Bowen, never returned, and in the case of Eschbacher, after Swanson made repeated calls to him he returned only one of these many calls.

On August 23, 1991, Swanson filed formal assault charges on Moore. Moore got upset about a travel suspense deadline and pointed his finger in Swanson's face, kicked Swanson's foot, and stood on the toe of Swanson's shoe. Moore demonstrated an aggressive, threatening manner during this incident. Moore did not assault any of his white managers.

On December 10, 1991, Swanson was charged annual leave for alleged tardiness. (Appendix L). This memorandum claims that Swanson was late on ten occasions between November 4 and December 10, 1991, on arriving at work. The arrival times were from 7:52 to 8:07 a.m. Swanson, at the time, was scheduled to be at work at 7:45 a.m. Swanson disagreed with the fact that he was claimed to be tardy on these days. He would be frequently stopped in the work area on his way to his office for business related matters. Also,

Swanson was not informed at any time between the fourth of November and the tenth of December that he was suspected of being late. He was never questioned about the time of his arrival at his office until he was given this memorandum. Swanson was a manager with supervisory responsibilities. Swanson testified that he regularly stayed two hours late and came in on weekends to finish his work. Moore was harassing Swanson because of his race and in retaliation for Swanson's prior EEO activity in writing Swanson up for allegedly being between seven and twenty-two minutes late in arriving at his office. The white managers were not watched by Moore to determine their arrival time. Swanson was also required to sign in and out, which was not required of white managers.

After the Agency investigated Swanson's complaints, Swanson elected to have an administrative hearing before the EEOC Administrative Law Judge. This hearing was held on February 27-28, 1992 and April 22-23, 1992. Shortly thereafter, on May 12, 1992, and in reprisal for his EEO activity, Swanson was notified of his directed reassignment to Fort Worth, Texas. Appendix O. Swanson was given 7 days to accept this directed reassignment or be terminated from federal service. Although it worked a severe hardship on his family, which led to a later divorce, Swanson accepted the directed reassignment under protest. When Swanson was given the directed reassignment, an armed guard was in the room when Moore read the directed reassignment to Swanson. Then Swanson was escorted out of the building like a criminal.

Eschbacher is aware of only one other time during his tenure when he gave an employee a directed reassignment

similar to Swanson's situation, with an ultimatum that it be accepted or the person would be removed from federal service. It comes as no surprise that that other individual is a non-white. He is Mexican American.

Swanson was the only African American at the GS-12 level or above in the New Orleans Field office. In this office in 1992, there were seven whites at the GS-12 level or above. Appendix H shows that at the 1990 Buildings manager conference in Austin Texas, Mr. Swanson was the only African American in attendance at the conference. Mr. Swanson testified that he was not invited to attend that conference after 1991, because he was no longer the head of an operation. He also testified that there were no longer any African Americans as heads of operations in the region.

Terry Duplessis, the local union president, testified that in his ten years as president of the union, African Americans have been disciplined more than the whites have been. This includes letters of warning, suspensions, and removals. Mr. Duplessis stated that while 15 to 20 African Americans have been disciplined in the past ten years, only 3 or 4 whites have been disciplined.

Debra Mazant, who worked directly under Swanson while he was in New Orleans, testified that the African Americans had to wait a full year to get their automatic promotion to the next grade level; whereas, the whites often received their promotions without waiting the full year.

Ms. Mazant also testified that she was told by Moore's secretary that a certain group of African Americans who worked for one of the contractors would not be invited back to

their Christmas party.

Ms. Mazant further testified that Ron Snow, a white branch manager, would make jokes about watermelon, fried chicken or sitting in the back of the bus. Ms. Mazant found these jokes to be offensive. She told Moore about them and, although they would stop for a while, after a couple of months, Mr. Snow would be telling jokes again.

Shirley Whittington, a African American fund clerk, who worked for GSA in 1984-1989 while Moore was there, testified that the whites could go and come as they pleased, but the African Americans were watched carefully and they had better be on time.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN *ST. MARY'S HONOR CENTER V. HICKS.*

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 113S.Ct.2742,2749, 125 L.Ed.2d 407 (1993), this Court held that the fact finder's disbelief of the articulated reasons of the employer, coupled with the elements of the prima facie case, may suffice to show intentional discrimination. In the majority opinion of the decision below, the Fifth Circuit held that because Swanson did not offer evidence of pretext, that a jury could not find discrimination or retaliation. This is contrary to this Court's holding in *Hicks*. The jury may disbelieve the articulated reasons of the employer and coulped with the employee's prima facie case of discrimination, may find intentional discrimination.

II. THE DECISION BELOW IS IN CONFLICT WITH THE FIFTH CIRCUIT STANDARD FOR TESTING JURY VERDICTS.

As pointed out in the dissent in the decision below, the Fifth Circuit standard for testing jury verdicts for sufficiency of evidence is set forth in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc).

> The Court should consider all of the evidence. . . in the light and with all reasonable inferences most favorable to the party opposed to the motion. . . If there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case should be submitted to the jury. . . .it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. At 174-75.

The Fifth Circuit has stated that its review of the jury verdict is "constrained by our generous deference to jury findings". *Taco Cabana Intern., Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1124 (5th Cir. 1991). This generous deference is missing from the decision below.

In the decision below, the dissent concluded that, under the *Boeing* standard, that there is evidence of such quality

and weight that reasonable jurors in the exercise of impartial judgment could have reached different conclusions as to whether (A) the employer discriminated against Swanson because of his race in (1) placing him under surveillance and docking his accrued annual leave time for being late to work; (2) denying him parking privileges on an equal basis with other supervisory personnel; (3) denying him appropriate staff assistance; (4) giving him an improperly low annual evaluation, which deprived him of an opportunity for promotion; and (B) the employer retaliated against Swanson by the above actions because Swanson filed complaints with the Equal Employment Opportunity Commission.

In fact, the trial judge agreed with the dissenting judge in the Fifth Circuit that there was sufficient evidence to sustain the jury verdict. Of the four federal judges that have closely scrutinized the evidence in this case, two have concluded that there is sufficient evidence to sustain the jury verdict and two (the majority of the Fifth Circuit panel) have concluded that there is insufficient evidence to sustain the verdict. The dissent characterized this case as being very close to the line dividing minimally sustainable jury verdicts from those that are deficient in evidentiary basis. In a close case such as this all inferences should be given to the conclusions of the jury, who weighed the credibility of the witnesses.

Civil Rights proponents fought long and hard to get jury trials in title VII cases added to the Civil Rights Act of 1991. It is a violation of the separation of powers in the structure of our federal government for the federal judges of the judiciary branch to decide this case after the legislative branch of government has by law stated that the case will be decided by the jury.

III. THE EVIDENCE SUPPORTED THE JURY VERDICT FINDING OF DISCRIMINATION OR RETALIATION IN THE AGENCY'S TREATMENT OF AFRICAN AMERICAN EMPLOYEE'S TARDINESS.

Appendix L is the December 10, 1991 Memo from Mr. Moore to Swanson, entitled Annual Leave Charged due to Tardiness. On this memo is listed ten days from November 4 to December 10, 1991, which Mr. Moore claims that Swanson was late to work. The arrival times were between 7:52 a.m. and 8:07 a.m., and Swanson was charged either 6, 12 or in the last instance 18 minutes of annual leave per day. At this time Swanson's workday started at 7:45 a.m. Swanson testified that he was a professional, a manager and that he did not expect to be nit-picked 6 minutes, especially when he is staying two hours over every day and coming in to work on the weekends to finish his work.

Ms. Mazant used the same term when she testified that after Swanson filed his first grievance, the whole atmosphere changed. There was a lot of nitpicking, tempers would flare . . . Swanson testified that no one told him that he was being watched during the period of November 4, 1991 until December 10, 1991. He also testified that no one else was being watched as he was. Moore testified that he did not on any of these occasions ask Swanson why he was late.

The white managers were not monitored to the minute. Ms. Mazant testified that Swanson's office was the only one in sight of Moore. All the other managers were on the other side of the building. She also testified that Moore's secretary, Edie would watch to see when Swanson would come to work. Then Moore himself would watch Swanson. This procedure of watching Swanson was not in place prior to Swanson

filing an EEO complaint.

Moore testified that Snow, Wortmann, and Pigg, who are white and were comparably situated managers supervised by Moore, did not have to sign in and out, but Swanson did.

Mr. Manual Gaines testified that he recalls an incident when Swanson's arrival time was questioned and on that occasion Swanson was not late. Gaines remembers that they arrived at 7:40 a.m.

Moore micro-managed Swanson on tardiness that he did not do with his white managers. Also, contrary to the majority opinion in the decision below, Swanson did deny that he arrived late at his office on those dates. On page A-56 of Appendix L, Swanson states in the last paragraph in his response to the record of infraction for alleged tardiness that he did not believe that he was tardy on the days indicated. Also on the same page of that response, Swanson relates that he was in the hospital for a week (from 11/11/91 to 11/16/91). On the first three days that he was back to work, Monday, November 18, 1991 through Wednesday, concerned coworkers, Elvera Pigg, Ricky Crawford, L.J. Bougeois and others, stopped Swanson in the hallway enroute to his office to express their feelings and share similar experiences with their family members. Moore, on the other hand did not make any attempt to contact Swanson while he was in the hospital, did not acknowledge Swanson when he returned from the hospital, did not express any interest in Swanson's health, and clandestinely wrote Swanson up for being allegedly being 7, 15 and 16 minutes late arriving at his office on his first three days back to work. A reasonable jury could believe from this evidence that Swanson was not tardy.

The act of Moore's clandestinely recording Swanson's alleged arrival times occurred after Swanson had filed 3 EEO complaints. His initial EEO complaint was filed in June 1990; followed by complaints filed in February, 1991 and September, 1991. There is evidence that the actions by Moore were in retaliation of Swanson's EEO activity.

Shirley Whittington, a African American fund clerk, worked for GSA from 1984 through 1989. She testified that she asked Moore if he was going to do to her what he was doing to Lillie Andrews at that time. (At that time Moore was in the process of removing Ms. Andrews from federal service). Moore replied "Not if we don't have to". Then, Ms. Whittington testified, of course they did do to her what they had done to Ms. Andrews. Also, Ms. Whittington testified that her supervisor, Christine Trevett told her that everybody was out to get Ms. Andrews.

Swanson was given the anonymous handwritten note at Appendix I after he filed his EEO complaint. It is an example of retaliation against him. After Swanson filed his EEO complaints, he was working in a hostile work environment.

IV. THE EVIDENCE SUPPORTED THE JURY VERDICT FINDING OF DISCRIMINATION OR RETALIATION IN THE AGENCY'S FAILURE TO PROVIDE PARKING SPACE IN BUILDING TO AFRICAN AMERICAN EMPLOYEE.

Mazant testified that all of the managers except Swanson were allowed to park in the basement of the Hale Boggs building. Swanson, she testified, never got a space.

Swanson testified that Snow, Wortmann and Sarver were not in New Orleans when he arrived. When Swanson arrived in New Orleans, he asked for parking in the basement, but never got it. Snow and Wortmann were GS-12's like Swanson, but because they are white, they got parking spaces in the basement when they arrived at the New Orleans office.

Swanson also testified that when he first arrived in New Orleans, he was told there were no parking spaces available for him. Then, after Swanson lost his branch, he was told that parking was only available for branch chiefs. As soon as Wortmann arrived, he was given a parking space. This indicates that there was a space for Swanson all along, but it was not given to him because of his race. Swanson was never told that he was not given a parking space because he was not a GS 12/13. The trial was the first time that Swanson had ever heard that theory.

Moore testified that Snow and Wortmann (both white and GS-12's) received parking spaces when they arrived and that Swanson didn't.

Defendant maintains that Swanson and 12 other employees were allowed to park elsewhere from October 1988 to July 1990. This point does not address the issue of whether the GS-12's were parking in the basement if they were white and not parking in the basement if they were African American. Another problem with the significance of this statement is that the jury decided their issues on conduct after November 21, 1991. Swanson presented the pre-November 21, 1991 conduct as evidence of a pattern and practice of discrimination, which is evidence that the conduct after November 21, 1991, was more likely than not motivated by race discrimination or retaliation.

Moore's last denial of parking in the Hale Boggs Building to Swanson was by Memo dated April 1, 1992, which is Appendix M. This Memo also withdrew parking privileges from Wortmann and Pigg, who were also GS-12's like Swanson. This Memo is an acknowledgment of an inequity in the parking arrangements. However, instead of giving a parking space to Swanson, Moore decided to take away the parking spaces of Wortmann and Pigg.

V. THE EVIDENCE SUPPORTED THE JURY VERDICT FINDING OF DISCRIMINATION OR RETALIATION IN THE AGENCY'S TREATMENT OF AFRICAN AMERICAN EMPLOYEE WHEN THE AGENCY DIRECTED REASSIGNMENT OF EMPLOYEE.

Swanson's directed reassignment to Fort Worth was in retaliation of Swanson's EEO activity, a protected activity under Title VII. Swanson concluded an EEO hearing before the Administrative Law Judge and then took a two-week vacation. When he returned the atmosphere in the office changed. Debra Mazant testified that after she testified in the EEO hearing in 1992, the atmosphere changed in the office. No one spoke to her or Swanson after the hearing unless it was work related. Also, Ms. Mazant was called into Ron Snow's office and he told her that the resason people treated her the way they did was because they believed that Ms. Mazant was a traitor. Ms. Mazant's understanding is that they were referring to her testifying against GSA or against Moore.

Swanson testified that he was given notice of his directed reassignment on May 12, 1992, the day after he sent a Memo to Moore, with the subject of "Official Misconduct

and Civil Rights Violations." See Appendix N. The last sentence of that Memo stated that "For these reasons, and other similar acts, I am notifying you and GSA of charges of official misconduct and civil rights violations that I plan to file against you and prosecute to the full extent of the law, both internally, Federal Court and in Civil Court."

The manner in which Swanson was given his directed reassignment is notable. Swanson was treated like a common criminal. The uniformed security guard was present in the room when the directed reassignment was read to him. The guard then escorted Swanson out of the building. The directed reassignment notice gave Swanson seven days to accept or reject it. If Swanson did not accept it or respond to it within seven days, Swanson may have been removed from federal service on August 3, 1992.

Defendant states that Eschbacher had issued approximately 12 directed reassignments over the years. However, Swanson was the only directed reassignment that Eschbacher could initially recall that he gave the employee the choice of accepting the reassignment or being removed from federal service. After a break in testimony when Eschbacher had an opportunity to confer with counsel, he remembered that there was a second employee that he had given an ultimatum directed reassignment to in addition to Swanson. That employee was a Mexican American. Swanson's EEO hearing concluded on approximately April 22, 1992. Swanson then went on leave and immediately upon his return, on May 12, 1992, Swanson was given his directed reassignment. The timing of Swanson's "I'm going to take you to court" memo of May 11, 1992; the end of the EEO hearing on April 22, 1992 is evidence that the directed reassignment of May 12, 1992, was in retaliation for the Swanson exercising his statutory rights.

Bowen attempted to give the impression that directed reassignments were done all the time, but when questioned, Mr. Manning's reassignment did not contain in writing that he must accept the reassignment or be removed from federal service. Also, there was no uniformed security guard present when Manning was given notice of his directed reassignment.

VI. THE EVIDENCE SUPPORTED THE JURY VERDICT FINDING OF DISCRIMINATION OR RETALIATION IN THE AGENCY'S ELIMINATION OF AFRICAN AMERICAN EMPLOYEE'S SUPERVISORY AUTHORITY.

After Moore and Eschbacher took Swanson's branch title away from him at the beginning of 1990, then Moore proceeded to take all of Swanson's staff away from him. Swanson was not allowed to supervise a white for longer than six months. By 1992, Swanson was down to one person under his supervision from a high of five persons. Similarly situated whites did not experience this reduction in staff.

There is a pattern of removing supervisory responsibility from Swanson by Moore. Swanson had supervised 25 people in Little Rock. In New Orleans, Swanson started as a branch manager. Swanson's job description included a computer programer that was supposed to work for Swanson. See Appendix F. Catalina Farrer was working for Swanson in that position and then one day Moore decided that she would not work for him. Moore gave no explanation to Swanson as to why Ms. Farrer was taken from his supervision and assigned to Tom Sarver.

Swanson was given Edie Fenstermacher Snow, who is white, as a secretary for approximately four to six months, then she was taken away. Swanson was given a Buildings Management Assistant, Alisa Ruth, who is white, for approximately four to six months. Then she was taken away. Jada Freeman Gespard, a student aide, worked for Swanson for a while, but she too was taken away from Swanson's supervision. In fact, Swanson was not allowed to supervise any white employee more than about six months.

Then Larry Moore and Manual Gaines were transferred away from Swanson's supervision. They were not replaced. At the time of the EEO hearing in the spring of 1992, Swanson only supervised Ms. Mazant.

As Swanson was losing his support staff, his workload increased. Swanson had to work long hours, including Saturdays and Sundays. Swanson even had to type his own contracts. Swanson also had to give his typing assignments to Moore's secretary for her to type. This was a problem for Swanson, because his typing often was not completed on time.

Swanson was only allowed to supervise white employees for a brief period. Then they would be reassigned by Moore.

Then the directed reassignment, which is Appendix O, directed that Swanson would not have a supervisory position in Fort Worth. Defendant claims that the decision to move Swanson to Ft. Worth against his will was the result of a 1992 reorganization of Region 7. However, Swanson was the only employee that was relocated as a result of this "reorganization" and Mr. Eschbacher could not recall anyone other than Swanson who lost a supervisory position as a result of this "reorganization.".

Conclusion

For all of the foregoing reasons, Petitioner Tommy L. Swanson, prays that this Court grant his application for writs of certiorari; that the Clerk of the U.S. Fifth Circuit Court of Appeals be requested to certify and transmit the record in No. 95-30880, "Tommy L. Swanson v. GSA", that a briefing schedule be set, and that after all due proceedings are had herein, the judgment of the U.S. Fifth Circuit of Appeals be reversed and the jury verdict and judgment of the district court be reinstated.

Respectfully submitted,

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APPENDIX A

Citation/Title
110 F.3d 1180, Swanson v. General Services Admin., (C.A.5 (La.) 1997)

*1180 110 F.3d 1180

Tommy L. SWANSON,
Plaintiff-Appellee/Cross-Appellant,

v.

GENERAL SERVICES ADMINISTRATION,
Roger W. Johnson, Administrator,
Defendant-Appellant/Cross-Appellee.

No. 95-30880.
United States Court of Appeals,
Fifth Circuit.
April 24, 1997.

Federal employee brought suit against employing agency, alleging race discrimination and retaliation for having filed Equal Employment Opportunity (EEO) complaints. Because plaintiff alleged discrimination occurring both before and after effective date of amendments permitting jury trial in Title VII cases, case was tried before both judge and jury as fact finders. The United States District Court for the Eastern District of Louisiana, Ronald A. Fonseca, United States Magistrate Judge, issued verdict finding for agency on all alleged acts of discrimination occurring before effective date of amendments, but jury found for plaintiff, and awarded him $120,000 in compensatory damages for

discriminatory acts occuring after effective date of amendments. Both employee and agency appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that evidence did not support jury verdict finding discrimination or retaliation in agency's treatment of black employee's tardiness, its failure to provide parking space in building to employee, its directed reassignment of employee, and its elimination of employee's supervisory authority.

Reversed and rendered.

Dennis, Circuit Judge, filed opinion concurring in part and dissenting in part.

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42 U.S.C.A. § 2000e et seq.

*1181 Victor Roma Farrugia, New Orleans, LA. for Swanson.

Glenn Kenneth Schreiber, Assistant U.S. Attorney, New Orleans, LA, for General Services Admin.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING, JOLLY and DENNIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal, we once again address the nature and degree of evidence required to support a jury verdict in a Title VII action allegir.g race discrimination and retaliation.

Judgment was entered upon a jury verdict in favor of Swanson, and GSA appeals. Following well-established precedent, we conclude that the evidence presented in this case was insufficient to support the verdict because Swanson failed to offer competent evidence suggesting either that GSA's nondiscriminatory explanations were pretextual, or that illegal discrimination was a motivating factor notwithstanding the existence of a legitimate explanation.

I

Swanson has worked for GSA since 1973. Swanson has received both automatic and merit-based promotions, and has worked in several cities of GSA "Region Seven," which is headquartered in Fort Worth, Texas. At the beginning of 1988, Swanson served as a Building Manager in Little Rock, Arkansas; Swanson's government rank at that time was GS-11. In the summer of 1988, there was a vacancy announcement for a "Supervisory Building Management Specialist" at the newly-conceived GSA "Facility Support Center" in New Orleans. Swanson applied for and was awarded the position, which carried a rank of GS-11/12. Because Swanson had already served in a GS-11 capacity for some time, he was promoted to GS-12 upon his arrival in New Orleans in October of 1988.

Many of Swanson's difficulties in New Orleans related directly to a series of organizational changes in the New Orleans office structure. The GSA office in New Orleans was originally only a "Field Office." In 1988, a GSA reorganization effort determined that the New Orleans office should be expanded and redesignated a "Facility Support Center." Mr. Glenn Moore, previously head of the New Orleans Field Office, became Director of the New Orleans Facility Support

Center as a part of the reorganization.

*1182 An internal GSA document prepared by the regional office, dated June 24, 1988, outlined the changes to the New Orleans office, and identified four separate "branches" of the new Facility Support Center: Real Estate, Design and Construction, Contracts, and Real Property management and Safety. The vacancy announcement to which Swanson replied announced the opening for the head of the Real Property Management and Safety branch. Moore hired Swanson for this position, believing at the time that Swanson would be a branch chief and that the new Facility Support Center could offer its branch managers career advancement opportunities.

Unknown to either Moore or Swanson, however, the June 1988 document labeling Swanson's department a "branch" was incorrect. A second document, dated September 7, 1988, no longer listed Swanson's position as the head of a branch. Although Swanson's "branch" had been formally eliminated even before he arrived in New Orleans, Moore and the other New Orleans employees did not realize the error until a December 1989 inspection, at which point Moore was told to eliminate the branch chief designation from Swanson's position.

The original description of Swanson's position indicated that he would directly supervise as many as five other employees: a building management specialist, a computer programmer, two physical security specialists, and one budget clerk. Swanson never directly supervised a computer programmer; Moore testified that this position was

incorrectly listed in Swanson's supervisory description. The New Orleans office did have a computer programmer who occasionally accepted document inputting assignments from Swanson, because Swanson had requested assistance with his typing.

For more than a year, Swanson did supervise employees in the other four positions. However, the December 1989 inspection determined that the workload in Swanson's area would not support the building management specialist, and Moore was told to transfer her to the Real Estate branch. Later, a decision at the national level removed the entire security program from the buildings management area; Swanson's two security specialists subsequently left the New Orleans Facility Support Center entirely. By 1992, Swanson supervised only the budget clerk, and received occasional secretarial assistance from Moore's secretary and a part-time student intern.

In January 1990, Swanson submitted a letter and request for transfer to Earl Eschbacher; Eschbacher was the Assistant Regional Administrator in Fort Worth, and he was Moore's direct superior at the time. Swanson indicated that he had developed severe asthma, his health was suffering, and he was unhappy that his status as a branch chief had been eliminated. Swanson stated that he felt he had been misled as to the advancement possibilities in the New Orleans position, stating that he "bought this scenario, hook, line and sinker." In the letter, Swanson requested that he be considered for a transfer to the Fort Worth or Dallas area.

Following his change in status, Swanson's working relationship with Moore and his co-workers rapidly deteriorated.

Sometime in early 1990, Moore established a sign-out board that applied to Swanson and the employees he supervised. In his March review, Swanson received an overall rating of "3" out of a maximum of five. A "3" rating was "fully satisfactory," but was a step down from the "4" that Swanson had received the previous year; Swanson refused to sign the review, although the employee signature line did not indicate agreement with the rating.

In May 1990, Swanson sent a memorandum to Jimmie Jones, a GSA building manager who was a colleague rather than a subordinate of Swanson. Swanson's memorandum included a demand that Jones perform some action in accordance with Swanson's specifications: "[t]he bottom line is I expect you all to stop whining, get off your duffs and do your damn job." When Jones complained to Moore, Moore responded by requiring Swanson to submit for Moore's review all correspondence Swanson intended to send beyond the New Orleans office.

In June 1990, Swanson filed his first EEO charge alleging racial discrimination. In July, Swanson sent an overnight package at *1183 GSA expense to a Mr. Robert Goodspeed at Goodspeed's personal post office box in Fort Worth. Goodspeed was a former member of the "Black Affairs Committee," apparently an informal committee of black GSA employees that was "recognized" by GSA, but had no official purpose within GSA. When the expense was discovered later that month, Moore demanded that Swanson reimburse GSA for the expense. When Swanson refused to do so, he was suspended for one day.

At some point in mid-1990, Swanson indicated to Moore

that he wanted to tape-record their phone conversations. In August, without waiting for a response, Swanson secretly taped a personnel-related conversation among himself, Moore, Eschbacher, and Kathy Wyche, a GSA personnel representative. In January 1991, Swanson delivered a typed transcript of the taped conversation with cover letter to Mr. Hollis Rutledge, the head of GSA Region Seven. At trial, Swanson further conceded that he had initially denied taping the conversation, and that he had destroyed the tape. In January 1991, Swanson was suspended on Eschbacher's recommendation for taping the phone conversation without the knowledge or consent of the other participants; Eschbacher testified that he had recommended a fourteen-day suspension, but that Rutledge reduced it to five days.

In April 1991, Swanson received a "letter of counseling" from Moore regarding his failure to follow procedures when requesting leave. In August, Swanson filed an assult charge with GSA security alleging that Moore had kicked Swanson about the ankle and lower leg; Moore stated that he stepped on Swanson's foot accidentally. The incident occurred during a confrontation between Moore and Swanson in Swanson's office, concerning a report Swanson needed to complete. In December, Moore sent Swanson a memorandum detailing ten occasions when Swanson had been tardy over the previous two months, and charging Swanson approximately two hours of annual leave.

Throughout this period, Swanson continued to file formal EEO complaints alleging race discrimination and retaliation. After his June 1990 complaint, Swanson filed a second complaint in February 1991. A third complaint was filed in September and a fourth in December. In April 1992,

Swanson submitted a grievance to Casey Bowen, the Regional Director or Real Property Management and Safety, concerning his performance evaluation for that year, which had again been a "fully satisfactory" rating of "3," and complaining of his mistreatment in New Orleans. Also in April 1992, a hearing was held on Swanson's EEO complaints.

The entire "facility support center" concept for the New Orleans office eventually failed in mid-1992. Swanson was not the only manager who never supervised the full staff he anticipated; *none* of the center's branches ever achieved the full staffing indicated in the 1988 plan. In mid-1992, the New Orleans GSA office was downgraded from a "facility support center" to an "enhanced field office." In this reorganization, the managers of the Real Estate, Design and Construction, Contracts areas all lost their status as "branch chiefs," and Moore's position was downgraded to Real Property Officer of the New Orleans Enhanced Field Office. The Shreveport Field Office, which had reported to Moore under the Facility Support Center concept, reported directly to Fort Worth after the 1992 reorganization.

On May 12, 1992, shortly after the EEO hearing and the second day after Swanson had returned to the office from two weeks' vacation, Swanson received a "directed reassignment" that transfererd him involuntarily to Fort Worth as a part of the reorganization of the New Orleans office. Swanson's position in fort Worth remained "Building Management Specialist" and his grade remained "GS-12," but the position was no longer supervisory. Swanson was given one week to decide whether to accept the position, which began on August 3, 1992. Swanson accepted the reassignment under protest, and remained employed by GSA in Fort Worth

during the pendency of this litigation.

II

Swanson filed suit in federal district court on March 15, 1994, alleging race discrimination and retaliation for having filed EEO complaints. Because Swanson alleged discrimination *1184 occurring both before and after the effective date of amendments permitting jury trial in Title VII cases, the case was tried before *both* a judge and jury as fact-finders. The parties agreed that the magistrate judge to whom the case had been referred would determine all issues relating to alleged acts of discrimination occurring before the November 21, 1991 effective date. The jury would determine liability and compensatory damages only on alleged acts occurring after that date. The trial itself was not bifurcated, however, and the jury heard all the evidence presented at trial.

At trial, Swanson argued that he had been the victim of repeated acts of racial discrimination and retaliation at the hands of Moore and Moore's superiors. Swanson presented testimony from Debra Mazant, his budget clerk; Manual Gaines, one of the two physical security specialists who reported to Swanson until 1992; Terry Duplessis, the local union president; himself; Moore; Eschbacher; and Herbert Patterson, the GSA security officer who took Swanson's report concerning the alleged assault in Swanson's office. Swanson additionally presented the transcript testimony of two former GSA employees who had contact with Moore and who stated that they had been discriminated against in a manner similar to Swanson.

Swanson identified six separate "adverse actons," that either occurred or were "continuing" after November 1, 1991, that he claimed were acts of illegal discrimination: (1) treatment of tardiness, (2) denial of training, (3) denial of parking, (4) annual evaluation, (5) directed reassignment to Fort Worth, and (6) elimination of supervisory authority. Several additional acts that occurred before November 1, 1991, presented questions for the judge only. Swanson argued that the repeated acts of discrimination caused him mental pain and suffering, and contributed to his health problems and the eventual breakup of his marriage.

The members of the jury were instructed that if they found that one or more of the acts constituted illegal discrimination, they were to determine an appropriate amount of damages to compensate Swanson for any emotional pain or mental anguish proximately caused by the acts found illegal. As the jury deliberated, the court issued its verdict on the alleged discrimination before November 1, 1991; the court found for GSA on all alleged acts of discrimination, including those that were also submitted to the jury under a "continuing" violation theory. The jury, however, found for Swanson on four claims; treatment of tardiness, denial of parking, directed reassignment and the elimination of supervisory authority. The jury awarded $120,000 in compensatory damages. In accordance with the jury's finding of liability, on May 8, 1995, the court entered $39.42 in backpay on the tardiness claim, and $43,058.87 in costs and attorney's fees. Both Swanson and GSA filed motions for judgment as a matter of law. The court denied both motions on June 30, 1995. This appeal followed.

III

GSA appeals the court's denial of its motion for judgment as a matter of law on all acts occuring after November 1, 1991, alleging that the evidence was insufficient to support the verdict reached by the jury. Swanson contends that the evidence was sufficient, citing both "general evidence" of discrimination against blacks at GSA, and also claiming that the transcript testimony of Lillian Andrews and Shirley Whittington demonstrated that Moore followed a pattern of discriminating against blacks who filed EEO charges.

Swanson cross-appeals the court's finding of no liability prior to November 1, 1991, contending that the court's factual conclusion was clearly erroneous. Swanson further appeals the court's decision to grant only $38.42 in equitable relief, and the court's rejection of certain transcript costs associated with post-trial motions.

Swanson additionally challenges the court's decision to grant GSA's motion in limine excluding the testimony of witnesses who would have testified to alleged acts of discrimination committed by other GSA managers in other offices. The court found that because the witnesses could not testify to acts of discrimination by anyone in Swanson's supervisory chain, the testimony would *1185 be irrelevant. The court alternately found that because the proposed witnesses were expected to testify only to their *belief* that they had been discriminated against—rather than direct evidence of discrimination, on any formal finding of discrimination—the probative value of the testimony would be outweighed by the time required essentially to relitigate each witness' claim.

IV

A

We first address GSA's challenge to the sufficiency of the evidence supporting the jury's verdict in favor of Swanson. We recently canvassed the law concerning sufficiency of the evidence claims in employment discrimination cases in our *en banc* decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir.1996) (*en banc*. In *Rhodes*, we determined that the plaintiff's case must, at the very least, create a conflict in substantial evidence from which the jury may infer illegal discrimination. *Id.* at 993.

In *St. Mary's Honor Center v. Hicks*, 509, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), the Supreme Court outlined the series of burden-shifting steps through which a Title VII plaintiff develops evidence from which the jury may infer discrimination. First, the plaintiff must establish a *prima facie* case of discrimination, after which the burden shifts to the employer to *articulate* a legitimate, non-discriminatory explanation for the challenged action. *Id.* at 507, 113 S.Ct. at 2747. Once the employer satisfies this burden of production, the plaintiff must show that the employer's explanation is not the true reason, but is instead a pretext for illegal discrimination. *Id.* at 508, 113 S.Ct. at 2747.

Hicks reiterated that the "inference of discrimination" raised by the *prima facie* case serves *only* to force the defendant to come forward with a legitimate explanation, and once the defendant does so, this inference "simply drops out of the picture." *Id.* at 507, 511, 113 S.Ct. at 2747, 2749 (*citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255,

101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981)). The plaintiff retains throughout the ultimate burden of proving that the defendant discriminated against him *because* of his race. *Id.* at 511, 113 S.Ct. at 2749. The inference of discrimination created by the *prima facie* case is gone. To satisfy the statutory burden, the plaintiff must offer *some* evidence, whether direct or circumstantial, that permits the jury to infer that the proffered explanation was a pretext for illegal discrimination. The trier of fact may not simply choose to disbelieve the employer's explanation in the absence of any evidence showing why it should do so. *EEOC v. Louisiana Office of Community Services,* 47 F.3d 1438, 1443-44 (5th Cir.1995) (*citing Elliott v. Group Medical and Surgical Serv.,* 714 F.2d 556, 562 (5th Cir.1983); *cert. denied,* 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984).

Accordingly, the question we face in this appeal is whether Swanson produced any evidence that, if believed, sustains his burden of proof. Having carefully reviewed the arguments of the parties and the record in this case, we conclude that Swanson's evidence—construed in the light most favorable to the verdict—demonstrates at most that his working relationship with his supervisors was hostile and unpleasant. Swanson simply offered no evidence that tends to disprove GSA's non-discriminatory explanations; nor did he offer any evidence that otherwise connects the adverse actions in question to Swanson's race or his filing of EEO complaints. We address in turn each action upon which the jury found liability.

(1)

Treatment of Swanson's Tardiness

[1] Swanson argued that Moore's December 1992

memorandum concerning Swanson's repeated tardiness was an act of discrimination against him because of his race and because he had filed several EEO complaints. The memorandum identified ten specific occasions over the previous two months when Swanson had arrived late for work and charged Swanson two hours of annual leave for the infraction.

Swanson made no real effort to show pretext: he never denied that he had arrived *1186 late at his office on those dates. Nor did Swanson argue that charging annual leave was an inappropriate or excessive response. Furthermore, Swanson did not attempt to show that other white managers had been late without similar penalties. He did testify that, for at least *some* of the dates, he did not "consider himself late" because, in one case, an employee had called Swanson at home early in the morning, delaying Swanson's departure for work. On one or more other unspecified occasions, Swanson stated, he had been stopped in the hall by building tenants because they recognized him as a building management employee, and some building-related question or concern. Even if Swanson specifically had offered explanations for each instance of tardiness, however, such testimony alone would not show pretext. The pretext question is not a question whether *Swanson* "considered himself" late, but whether *Moore* considered Swanson late when he decided to charge Swanson with annual leave for his tardiness. Swanson conceded that, on those occasions when he arrived late, he did not go to Moore with any explanation. (FN1)

Rather than attempting to show pretext, Swanson's testimony focused on a complaint that his comings and goings were unfairly "micro-managed,' and that he was

"watched" closely while other white managers were not. Both Swanson and Debra Mazant, Swanson's budget clerk, testified that Swanson was "watched" closely by Edie Fenstermacher, Moore's secretary. Again, we note that Swanson never attempted to show that white employees were regularly late but not "watched."

Even *assuming* that an employee may claim discrimination by being "caught" unfairly in a work rule infraction without a demonstration that others committed similar infractions, Swanson's evidence falls short. Mazant testified that Fenstermacher seemed to be watching to see when Swanson would arrive, but Mazant also testified that Fenstermacher was the office's time and attendance clerk, and that Mazant herself had occasionally been forced to go to Moore with problems when Swanson was late and could not be reached. Mazant's testimony simply does not connect the close scrutiny of Swanson's arrival with either his race or his filing of EEO claims.

In fact, the only testimony that Swanson offered that connected the scrutiny to his race were conclusory statements by Shirley Whittington and Lillian Andrews that blacks were closely "watched". Whitington testified that whites "could leave out any time that they wanted" while "the blacks were always, like, you know, you sort of better be on time or something was said or you were watched." Swanson argues that this testimony is sufficient to sustain the jury's verdict on the tardiness claim because it shows a pattern of discriminating against blacks by scrutinizing them more than whites. We disagree.

Like much of the "evidence" upon which Swanson

Whittington's and Andrews' statements are not "evidence"—they simply reflect the *opinions* of the witnesses on a fact issue that is for the jury to decide. Without testimony of the circumstances, or without examples of blacks who were scrutinized while similarly-situated whites were not, a broad, generalized statement that black employees were "watched" more closely than whites is incompetent to establish a pattern of discrimination. *See, e.g., Odom v. Frank,* 3 F.3d 839, 849 (5th Cir.1993) (rejecting anecdotal and speculative opinion testimony concerning an "unwriten policy" discouraging advancement of older employees).

(2)

Denial of Parking

[2] Swanson argued that he was denied parking in the basement of the Hale Boggs *1187 Courthouse, the building where GSA's New Orleans office is located, on the basis of his race. GSA responded that Moore distributed a limited number parking spaces on the basis of a ranking system that awarded spaces to the highest ranked individuals, and then, as spaces later became available, to those GS-12 employees who were branch chiefs.

Swanson argued that this explanation is pretextual because he was believed to be a branch chief until December of 1989, yet he was not awarded an in-building parking space even though other branch managers received parking spaces "when they arrived." Yet Moore testified that in early 1986, he was the only GSA employee with in-building parking. Late, in 1988, Moore obtained two additional parking spaces, and awarded them to Tom Sarver, the Field Office manager

who was ranked GS-13, and Ron Snow, who arrived shortly after Swanson to serve as the chief of the Real Estate branch. Swanson pointed to Snow, arguing that when Snow arrived he was a GS-12 branch manager like Swanson. GSA produced evidence that Snow's position was a GS-12/13 while Swanson's was a GS-11/12. Moore further testified that in 1988 and 1989, the other white GS-12 branch managers, including Evelyn Morris and Elvera Pigg, did not have in-building parking. Moore testified that additional parking spaces were not available until early 1990; these spaces were then awarded to Pigg and Ed Wortmann, both GS-12 branch chiefs. By early 1990, the GSA inspection had revealed that Swanson had been incorrectly labeled a branch chief. Moore testified that neither Swanson nor Alex Deverede, a white GS-12 with greater supervisory responsibilites than Swanson, ever received in-building parking.

As complicated as the parking explanation may be, the uncontroverted evidence nonetheless establishes a legitimate ranking system for awarding limited benefits, and that this ranking system excluded whites who shared Swanson's rank. Swanson did not offer evidence that contested Moore's testimony concerning either the timing or the rank of the individuals who received parking. Nor did Swanson offer evidence that additional parking spaces were available, or that Moore could easily have obtained sufficient parking spaces for all the supervisory GS-12 employees.

The only evidence Swanson offered that purported to show that the distribution of parking was discriminatory, was the testimony of Lillian Andrews, who testified that Moore, who supervised her previously, took away her parking space. Andrews testified that Moore claimed the space was needed

for another agency. Andrews also testified, however, that her white colleagues of similar rank did not even *have* parking spaces. By way of explanation, Andrews stated that her white colleagues did not need parking spaces, because, she thought, one did not drive and the other rode to work with her husband.

The fact that Moore "took away" Andrews' parking space when the space was required by another agency—an explanation that neither Andrews nor Swanson contested—is not evidence that Moore discriminated against blacks in the distribution of parking. Undisputed testimonmy at trial revealed that, in April 1992, Pigg and Wortmann, both white GS-12 branch chiefs, similarly lost their parking spaces when an incoming agency needed parking for its employees. Again, Swanson offered no evidence to contest Moore's testimony that the number of parking spaces available to GSA employees fluctuated according to the needs of tenant agencies.

As with the claim concerning the treatment of his tardiness, Swanson presented no competent evidence from which the jury could conclude either that Moore's description of his system for distributing parking spaces was false, or that illegal race discrimination nonetheless motivated Moore's decision to deny Swanson an in-building parking space. Swanson offered only the conclusory opinion of another employee that Moore discriminated against her because of her race when he "took away" her parking space. Yet there was no *evidence* from which the jury could infer that race, rather than rank and limited availability, was the dispositive factor. Without such evidence, there was no legitimate basis from which the jury could disregard *1188 GSA's proffered

non-discriminatory explanation.

(3)

Directed Reassignment to Fort Worth

Swanson's claim that his directed reassignment to Fort Worth was discriminatory focuses upon the contention that the directed reassignment was an action taken against him in retaliation for his EEO activities. (FN2) GSA responded that the directed reassignment was part of the downgrading of the New Orleans office from a Facility Support Center to an Enhanced Field Office. Eschbacher offered undisputed testimony that the decision to transfer Swanson was made by Eschbacher in Fort Worth, and that Moore did not participate in the reassignment, except to deliver Eschbacher's letter to Swanson when the letter was received in the New Orleans office.

Swanson argued that the reassignment was retaliatory because it was issued shortly after an administrative hearing on Swanson's EEO complaint, and immediately following Swanson's return from a two-week vacation. Eschbacher testified, however, that the changes to the New Orleans office had been planned for more than a year, and that there was inadequate work in the New Orleans office to support Swanson's position. Eschbacher further testified that no other GSA "enhanced field office" had a "supervisory building management specialist." Eschbacher explained that he had decided to move Swanson to Fort Worth in February, but waited until May to inform Swanson of the transfer, so that the transfer would not interfere with the EEO hearings being conducted in New Orleans.

Swanson never attempted to disprove any of Eschbacher's testimony, but maintained that the May 12 reassignment must have been retaliatory because on May 11, Swanson prepared a "civil rights" memorandum detailing alleged abuses and indicating that he would continue to prosecute his discrimination claims. Swanson testified that he sent the memorandum to Moore the same day, but Moore testified that he did not see it until May 12, after the directed reassignment had arrived from Fort Worth. Swanson offered no evidence to show that Eschbacher, who made the decision, was even aware of his civil rights memorandum.

[3] Close timing between an employee's protected activity and an adverse action against him may provide the "causal connection" required to make out a *prima facie* case of retaliation. *Armstrong v. City of Dallas,* 997 F.2d 62, 67 (5th Cir.1993). (FN3) However, once the employer offers a legitimate, nondiscriminatory reason that explains both the adverse action and the timing, the plaintiff must offer some evidence from which the jury may infer that retaliation was the real motive. Swanson did not argue that the reorganization was a pretext; indeed, the undisputed evidence indicates that *most* of the New Orleans management personnel, including Moore himself, were adversely affected in May 1992 when the New Orleans office was downgraded to an "enhanced field office."

[4] Although Swanson was the only person relocated to a different office, GSA offered uncontested testimony that there was insufficient work to support Swanson's position in New Orleans. Swanson never attempted to show that there was sufficient work for him to remain in New Orleans. He *1189 did not offer evidence that other managers in New

Orleans also had insufficient work, but were not transferred. In short, Swanson failed to raise a factual dispute as to GSA's nondiscriminatory explanation for the transfer. Nor did Swanson offer evidence that connected the transfer to his EEO activity, from which the jury could infer that Eschbacher was motivated by a desire to *retaliate* against Swanson when he decided to transfer Swanson to Fort Worth. (FN4) Accordingly, Swanson's claim that his directed reassignment to Fort Worth was discriminatory fails for lack of evidence.

(4)

Elimination of Supervisory Authority

[5] With respect to the specific incidents that led to Swanson's loss of supervisory authority, the record and briefs are unclear as to which incidents were considered by the jury in finding liability on this point. The jury was the factfinder as to liability for acts occurring after November 1, 1991. Swanson lost supervisory authority as part of his directed reassignment to Fort Worth, but we have already concluded that there was insufficient evidence to sustain a finding of liability on that basis. Swanson's job title, rank and pay remained the same in Fort Worth. Swanson offered no evidence that his workload in Fort Worth required that he have assistants to supervise, nor did Swanson argue that a more appropriate position with supervisory responsibilities was available when he was transferred. In fact, Swanson presented no evidence whatsoever concerning his position in Fort Worth.

The record does not reveal exactly when in 1991 the two physical security specialists, Manuel Gaines and Larry

Moore, were removed from Swanson's supervision, but Swanson did not dispute Moore's testimony that the decision to separate security operations from building management entirely was made at the national level. The jury therefore could not have inferred that the local or regional GSA officials discriminated or retaliated against Swanson by removing the security specialists.

The jury *might* have based its verdict on the loss of supervisory authority caused by the removal of the computer programmer position and the transfer of Alissa Ruth, the building management specialist, to the Real Estate branch, if the jury concluded that their earlier removal from his supervision constituted a "continuing violation." Assuming that the loss of supervisory authority may be a continuing violation, we nonetheless conclude that the evidence was also insufficient on this claim.

The pattern is familiar. Moore offered legitimate explanations for these actions. The computer programmer position had been incorrectly included in the description of Swanson's supervisory responsibilities; Swanson's area of management had no need of a computer programmer. Ruth was transferred to Real Estate when, following the December 1989 inspection, Moore was informed that Swanson's area did not have enough work to support both Swanson and a lower-level building management specialist.

Swanson never offered evidence that these explanations were pretextual. Although Swanson repeatedly argued that he needed typing support because he was not a trained typist, he did not indicate any use in his area for a computer *programmer*. Furthermore, Mazant, Swanson's budget assistant,

testified that none of the branch managers had administrative support just for typing—a statement that Swanson did not dispute. Swanson's only "evidence" of race discrimination in the elimination of supervisory authority were generalized and unsubstantiated statements by Swanson and Andrews that blacks were never allowed to supervise whites for very long. Such unsupported testimony is nothing more than a subjective opinion that is incompetent as evidence to establish Swanson's claim of discrimination. Furthermore, it is irrelevant to Swanson's specific claim as *1190 at least half of the subordinates who were "taken away" from him were black.

We conclude, therefore, that the evidence was insufficient to sustain the jury's finding of liability, and the court below erred when it denied GSA's motion for judgment as a matter of law.

B

Because we conclude that the evidence was insufficient to support the jury's verdict, we need not address Swanson's cross-appeal concerning the amount of equitable damages and costs awarded. Additionally, for the same reasons cited above, we reject Swanson's argument that the court's finding of no liability on acts occurring prior to 1991 was clearly erroneous.

[6] Swanson's last ground of appeal is a challenge to the district court's decision to exclude the testimony of several witnesses from offices other than New Orleans. Swanson argues that their exclusion was erroneous based on this court's recent decision in *Kelly v. Boeing Petroleum Services,*

Inc., 612 F.3d 350 (5th Cir.1995). In *Kelly*, the excluded witnesses would have testified to acts concerning the plaintiff's actual work environment. The court concluded that although a district court may abuse its discretion by summarily excluding work environment witnesses, the district court in Kelly's case did not do so, but in fact had carefully considered each witness.

Here, by contrast, the excluded witnesses were not New Orleans employees and could not testify to Swanson's work environment in New Orleans or to his relations with Moore. Swanson argues that the excluded witnesses would have testified to similar discriminatory actions, such as the denial of parking, retaliation after filing EEO complaints, and not being "allowed to supervise whites." Because the chain of command from these witnesses similarly led to Earl Eschbacher and Casey Bowen in the Fort Worth regional office, Swanson argues that their testimony would reveal a pattern" that also affected Swanson.

The court below carefully considered the anticipated testimony of each witness, and determined that the witnesses could offer only speculation that any adverse actions they suffered were the result of racial discrimination or retaliation. We conclude that the court did not abuse its discretion in rejecting this argument after individually considering the expected testimony of each witness.

V

In conclusion, we hold that the Swanson failed to produce sufficient evidence of either race discrimination or retaliation to sustain the jury verdict in his favor. Accordingly

the decision of the court below denying GSA's motion for judgment as a matter of law is REVERSED, and judgment is hereby RENDERED in GSA's favor.

REVERSED and RENDERED.

DENNIS, Circuit Judge, concurring in part and dissenting in part:

I respectfully concur in part and dissent in part. This case is on all issues very close to the line dividing minimally sustainable jury verdicts from those that are deficient in evidentiary basis. However, the evidence is of such quality and weight that reasonable and fair minded persons in the exercise of impartial judgment could find that, in a number of instances, the employer's explanations for its adverse employment actions were not worthy of belief and that the employee was the victim of intentional discrimination.

If the employer satisfies its burden of producing evidence that the complained of adverse employment actions were taken for legitimate, nondiscriminatory reasons, the presumption of discrimination disappears. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). The disappearance of the presumption, however, does not mean that the jury cannot consider evidence introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the employer, supported by evidence, destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the *1191 jury in deciding whether the employer's explanation is worthy of belief and

whether the employee has been the victim of intentional discrimination. *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 993-94 (5th Cir.1996) (en banc); See *Hicks,* 509 U.S. at 511, 113 S.Ct. at 2749; Texas Dept. of Comm. *Affairs v. Burdine,* 450 U.S. 248, 255 n. 10, 101 S.Ct. 1089, 1095 n. 10, 67 L.Ed.2d 207 (1981).

Once the presumption of discrimination disappears, the case is treated like any other civil case. *Guiberson,* 75 F.3d at 993. We test jury verdicts and motions for summary judgment for sufficiency of the evidence under the *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir.1969) (en banc), standard. The standard for granting a Rule 56 motion for summary judgment or a Rule 50 motion for judgment as a matter of law is the same. *Id.* at 369 n. 4. In *Boeing,* after thorough study of the numerous prior decisions of this court which had dealt with the subject, as well as the different formulations of legal writers and commentators, the court announced the following standard:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different

> conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75.

Applying the Boeing standard to all of the evidence in the present case, in the light and with all reasonable inferences most favorable to the plaintiff, I conclude that there is evidence of such quality and weight that reasonable jurors in the exercise of impartial judgment could have reached different conclusions as to whether (A) the employer discriminated against Swanson because of his race in (1) placing him under surveillance and docking his accrued annual leave time for being late for work; (2) denying him parking privileges on an equal basis with other supervisory personnel; (3) denying him appropriate staff assistance; (4) giving him an improperly low annual evaluation, which, deprived him of an opportunity for a promotion; and (B) the employer retaliated against Swanson by the above actions because Swanson filed complaints with the Equal Employment Opportunity Commission.

There was evidence that white employees were not

monitored for late work arrivals and that the management watched black employees more closely for work rule infractions than other employees. There was also testimony that Swanson was the only manager who was required to sign in and out. Ms. Mazant testified that after Swanson filed his first complaint the work atmosphere changed and that close surveillance of Swanson began after his first grievance. Although Swanson was told he could not have parking privileges due to his lack of seniority and the lack of available space, there was evidence that less senior white employees were given parking spaces immediately upon their arrivals. There was evidence that Swanson was the only manager not allowed to park in the basement garage. In support of his complaint that he was denied adequate staff assistance, Swanson testified that he regularly stayed two hours late and came in on weekends *1192. to finish his work, and that he frequently had to type voluminous contracts.

On the other hand, I agree with the majority that the jury's finding that the employer reassigned Swanson to Fort Worth for discriminatory or retaliatory reasons is not supported by a sufficient basis in the evidence. The decision to relocate Swanson was made at the Regional level by management in Fort Worth. The employer gave a legitimate, nondiscriminatory reason for the reassignment—there was no longer a need for a Building Management Specialist in New Orleans. There is no evidence from which a reasonable inference could be drawn that the employer's Fort Worth regional office decision to reassign Swanson was connected with the evidence of discrimination by his New Orleans superiors.

Accordingly, I concur in the majority's decision to

reverse the jury verdict with respect to the employer's reassignment of Swanson to Fort Worth and to the resulting loss of his supervisory authority; but I respectfully dissent from the majority's decision to reverse the jury's verdict in all other respects.

FN1. Swanson argued that Moore should have come to *him* to ask why he was late and whether Swanson was experiencing any problems. Swanson further insisted that because he, Swanson, was a manager, Moore should have dealt with the tardiness problem "informally." Moore testified, and Swanson did not deny, that he had counseled Swanson on several prior occasions about Swanson's lateness, and even suggested that Swanson change his work hours. Without evidence that Moore's response was inappropriate, or that similarly situated employees were treated differently, there was no evidence from which the jury could infer discriminatory intent.

FN2. Swanson also stated that the only other employee he knew who had received a directed reassignment was also minority (Hispanic). Eschbacher testified that he had issued directed reassignments to as many as 12 employees during his tenure in Fort Worth. Swanson presented no specific cases or statistical evidence to demonstrate that only minorities received directed reassignments. Swanson also conceded that transfers were an anticipated part of his job.

FN3. We observe, though, that the mere fact that some adverse action is taken after an employee engages in some protected activity will not *always* be enough for a *prima facie* case. Between June 1990 and May 1992,

for example, Swanson filed four EEO complaints, issued various grievances and memorandums complaining of discriminatory actions, and participated in an EEO hearing and numerous meetings with his lawyer. If timing *alone* were enough, any action taken against Swanson after June 1990, no matter how justified, could be sustained as discriminatory. Title VII's protection against retaliation does not permit EEO complainants to disregard work rules or job requirement.

FN4. It is, in fact, difficult to understand how Eschbacher would have viewed the transfer as retaliatory given that Swanson had twice requested that he be relocated away from New Orleans, once specifically naming Fort Worth as a desirable option. Although Swanson testified that by May of 1992, he no longer wanted to move to Fort Worth, he conceded that he never told Moore or Eschbacher of this change of heart.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TOMMY L. SWANSON	**CIVIL ACTION**
versus	**NUMBER 94-0846**
ROGER W. JOHNSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION	**SECTION "F" (4)**

FILED
MAY 8 '95

J U D G M E N T

Considering the verdict of jury returned on March 14, 1995, oral findings and conclusions entered on the record on march 14, 1995 and May 3, 1995, and written Order and Reasons filed this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Tommy L. Swanson and against Roger W. Johnson, Administrator, General Services Administration, in the amount of $120,039.32, together with attorney's fees in the amount of $42,072.50 and costs of $986.37.

New Orleans, Louisiana, May 8, 1995.

/s/ Illegible

RONALD A. FONSECA
United States Magistrate Judge

DATE OF ENTRY MAY 11 1995

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TOMMY L. SWANSON	**CIVIL ACTION**
versus	**NUMBER 94-0846**
ROGER W. JOHNSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION	**SECTION "F" (4)**

FILED
Jun 30 '95

ORDER AND REASONS

This matter has been referred to the undersigned Magistrate Judge upon the consent of the parties pursuant to 28 U.S.C. § 636(c). At the conclusion of the trial, the jury found for the plaintiff and awarded $120,000.00 in damages. Defendant has filed a "Renewed Motion for Judgment as a matter of Law and/or Alternatively for a New Trial." Plaintiff filed a memorandum in opposition, and the motion was taken under submission without oral argument.

Having considered defendant's motion, plaintiff's opposition, and the record of the case, the Magistrate Judge finds that there was a legally sufficient evidentiary basis for

DATE OF ENTRY JUL 3 1994

a reasonable jury to find as the jury did in this case and that the jury verdict is not against the great weight of the evidence. *See* Rules 50(b) and 59(a) of the Federal Rules of Civil procedure; *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969); *Franks v. Associated Air Center, Inc.*, 663 F.2d 583 (5th Cir. 1981). As to one of the specific issues raised by defendant, i.e, the amount of damages awarded by the jury, the Magistrate Judge find that the award of $120,000 is certainly on the high end of the scale for the injuries involved, but it cannot be said that the amount is unreasonable or against the great weight of the evidence.[1]

Accordingly, it is hereby ordered that defendant's Renewed Motion for Judgment as a Matter of Law and/or Alternatively for a new Trial be DENIED.

New Orleans, Louisiana, this 30 day of June, 1995.

/s/Illegaible

RONALD A. FONSECA
United States Magistrate Judge

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[1] In his motion, the defendant argues that plaintiff did not sufficiently prove any out-of-pocket expenses resulting from the denial of parking or from the sale of his house when he was reassigned. However, the only elements of damages that the jury was instructed to consider were past, present and future emotional pain and suffering, mental anguish, inconvenience, and/or loss of enjoyment of life. (Tr. Vol. 7, p. 7-71, In. 22 to p. 7-72, In. 3). Accordingly, there is no reason to believe that the jury awarded damages for out-of-pocket expenses for parking or the sale of plaintiff's house.

APPENDIX D

Text of the Act

The Civil Rights Act of 1991
Public Law No. 102-166

"§1977A. Damages In Cases of Intentional Discrimination In Employment

"(c) Jury Trial. — If a complaining party seeks compensatory or punitive damages under this section —

''(1) any party may demand a trial by jury; and

''(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TOMMY LEE SWANSON	*	**CIVIL ACTION**
	*	
VERSUS	*	**NO. 94-0846**
	*	
ROGER W. JOHNSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION MANAGEMENT AND	*	**SECTION "F" MAG. (4)**

FILED
SEP 15 '95

NOTICE OF APPEAL

NOW INTO COURT, through the undersigned counsel, comes plaintiff, Tommy L. Swanson, (hereafter referred to as "Swanson"). who appeals to the United States Court of Appeals for the Fifth Circuit from the judgment entered on the record on March 14, 1995 and May 3, 1995, and written Order and Reasons entered in this matter on July 3, 1995.

Defendant filed a Notice of Appeal to this Order on September 1, 1995. Swanson is filing this Notice of Appeal within 14 days of defendant filing its notice, pursuant to the Federal Rules of Appellate Procedure.

Swanson hereby appeals the trial judge's evidentiary ruling that other black employees discriminated against because of their race by the same deciding officials that discriminated against Swanson were not allowed to testify at trial, even though they were at the trial for several days and they had come to the trial from out of state; findings of no discrimination based on acts prior to November 21, 1991, the effective date of the Civil Rights Act of 1991; the finding of the trial judge of equitable relief of only $39.32 for all of the acts of discrimination found by the jury for post November 21, 1991 acts of defendant; and the findings of the trial judge of costs of only $986.37. Swanson reserves his right to appeal other issues in the trial court's findings and rulings during the course of this jury trial and the post trial motions and rulings.

Respectfully submitted,

/s/ Victor R. Farrugia

VICTOR R. FARRUGIA #19324
A PROFESSIONAL LAW CORPORATION
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Suite 1028
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(504) 525-0250

ATTORNEY FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that the above pleading has been served on all counsel of record by placing a copy of same in the U.S. Mail, postage prepaid and properly addressed, this 15th day of September, 1995.

/s/ Illegible

Disseminates information concerning new and improved crafts and operating techniques.

8. Reviews new construction plans, project directives and lease solicitations to ensure that the proposed design includes features required for economical and effective maintenance and repair and buildings services operations.

9. Analyzes cost and work measurement reports. Applies staffing criteria to current and future workload and analyzes and evaluates current and future equipment and personnel requirements.

10. Conducts investigations, evaluations, and inspections to determine whether steam, water, air-conditioning, electricity, and other utilities are being provided at favorable rates and minimum cost and are being used effectively, safely, and with prudence.

11. Collects and disseminates information relating to the proper management of utility operations and energy conservation, including formal training in utilities management.

12. Prepares specifications and administers contracts for building maintenance, operation, repair, and buildings services.

13. As a member of the management evaluation team, evaluates the effectiveness of buildings managers and crafts personnel within the Center's area of responsibility in carrying out all maintenance and operations and utility conservation programs and policies.

14. Assists in the coordination, preparation and submission of the annual budget processes necessary for funding the Center's maintenance and utilities programs.

Performs others duties as requested.

SUPERVISORY RESPONSIBILITY

Exercises direct supervision over one Building Management Specialist (GS-1176-5/7/9/11), one Computer Programmer (GS-334-5/7/9), two Physical Security (GS-080-11), and on Budget Clerk (GS-5-01-6). Delegates sufficient authority to personnel so that assigned duties and responsibilities may be effectually performed. Recognizes and commends individual merit and performance, and takes steps to improve poor performance.

PHYSICAL DEMANDS

Work is sedentary in nature; however, during inspections, the employee may be required to climb ladders, walk numerous flights of stairs, and may work in unheated and unfinished buildings.

APPENDIX G

NEW ORLEANS ENHANCED FIELD OFFICE

GRADE	WHITE		BLACK		HISPANIC		NATIVE AMERICAN	
GS	M	F	M	F	M	F	M	F
14	1	0	0	0	0	0	0	0
13	2	0	0	0	0	0	0	0
12	2	2	1	0	0	0	0	0
11	3	4	0	0	0	1	0	0
09	0	0	0	0	0	0	1	0
07	1	0	0	1	0	0	0	0

NEW ORLEANS ENHANCED FIELD OFFICE (continued)

GRADE GS	WHITE M	WHITE F	BLACK M	BLACK F	HISPANIC M	HISPANIC F	NATIVE AMERICAN M	NATIVE AMERICAN F
06	0	1	0	1	0	0	0	1
05	0	2	0	0	0	0	0	0
Wage Grade								
10	3	0	2	0	0	0	1	0
09	2	0	2	0	0	0	0	0
08	2	0	0	0	0	0	0	0
07	1	0	3	0	0	0	0	0

NEW ORLEANS ENHANCED FIELD OFFICE (continued)

GRADE GS	WHITE M	WHITE F	BLACK M	BLACK F	HISPANIC M	HISPANIC F	NATIVE AMERICAN M	NATIVE AMERICAN F
Wage Grade (continued)								
05	1	0	3	0	1	0	0	0
04	1	0	0	0	0	0	0	0
Student Aides								
	0	0	0	3	0	0	0	0

Source: Investigator

APPENDIX H

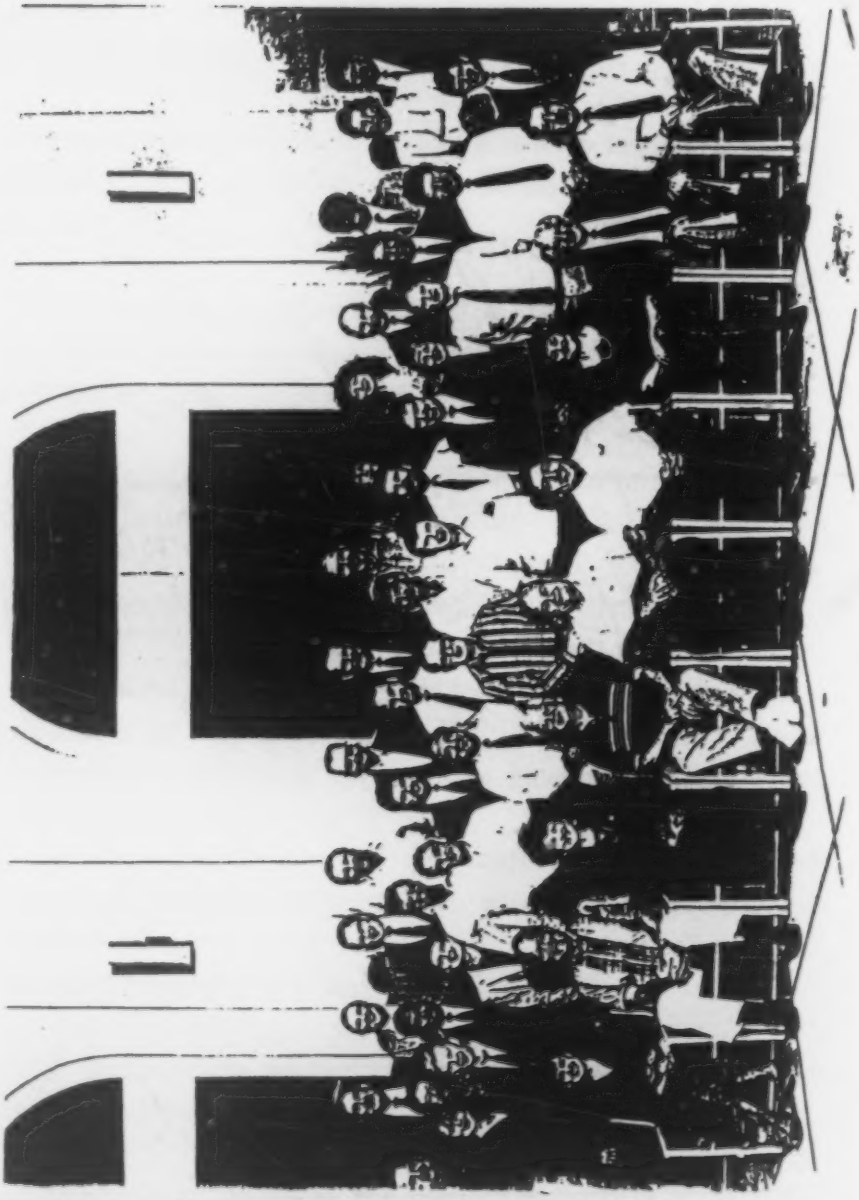
BUILDINGS MANAGERS CONFERENCE, AUSTIN, TEXAS, APRIL 23-27, 1990

Front Row:
Faye Sandberg, Casey Bowen, Judy Parnell, Earl Eschbacher, George Moore, Ramiro Mora, Wanda Kiser, Ken Marshall, Casey Jones

2nd Row:
Elsie Acevedo, Lane Huneycutt, Tom DiBernardo, Isaac Elizondo, Tony Valenti, Jim Whimpey, Neil Rogers, Don Rogers, Bob Dunn, Gordon Pribyl, Steve Rutledge

3rd Row:
Jim Jaynes, Sharon Reidinger, Joe Torres, Jimmie Jones, David Saenz, George Mohr, Doug Hamilton, Steve Elliott, Beth Toppert, Gil Bryant, Neal Crowley

Back Row:
Tom Sarver, Dennis Case, Louis Carrol, Jim Greenhill, Dennis Matthiesen, J. T. Glass, Harold Kenny, Janice Torres, Pat Sams, Bill Jennings, Tommy Swanson, Glenn Moore



APPENDIX I

Tommy, it is
so peaceful
when you're
not in the
Office, you should
stay away a little
more often

APPENDIX J

Public Buildings Service
Critical Elements

1. Plans, directs, controls, schedules and *40%* implements procedures in the operation of the Buildings Management Branch:

a. Develops specifications, estimates, and procurement requests for the contracting of building services. (90% to 7PZP on or before the dates).

b. Maintains accurate workload documents. (95% of workload is up-to-date and accurate).

c. Directs the Regional Concessions Program of the FSC.

d. Provide technical support to field, regional and other staff offices by way of prompt reply to all inquiries and the timely dissemination of appropriate data and information.

e. Implements security, law enforcement and Crime Prevention Awareness programs, monitors and sures technical guidance is provided to ignated officials for Occupant Emergency Plans.

f. Implements security, law enforcement and Crime Prevention Programs.

g. Monitors Occupant Emergency Plans within the FSC.

Office: 7PZM
Supervisory Building Management Specialists, GS-1176-12

Establishes realistic goals and objectives and periodically reviews performance levels and evaluates problem areas. Achieves at least 75% of goals established for appropriate organization by Regional Administrator. (These goals will be listed in appropriate performance plans of subordinates and are attached to this form for easy reference.)

Customer services are provided at acceptable levels. Controllable customer charges or other costs are typical. Commendations outnumber complaints. Most complaints are reconciled to the satisfaction of the customer..

Program plans and controls are fully acceptable. Planning is accomplished on known future activities. Program actions are logical, complete and based on adequate analyses of the situation. Consideration of alternatives for improving operations is evident.

Management support is fully acceptable and indicates loyalty and dedication too accomplishing agency objectives. Successfully implements policies and decisions by higher management.

Supports Regional Administrator's SES objectives by appropriate mission accomplishment. (See attached for listing of performance objectives in his or her performance plan.)

APPENDIX K

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March 6, 1995

The Honorable Ronald A. Fonseca
U.S.District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, La. 70130

RE: ***Tommy L. Swanson v. Roger W. Johnson, Administrator, GSA,*** Civil Action No. 94-0846.

Dear Judge Fonseca:

The following is the proposed testimony of the witnesses from outside of the New Orleans area, who will testify concerning a pattern and practice of discrimination by GSA and the same management officials, Earl Eschbacher and Casey Bowen, who made the adverse employment decisions against the plaintiff in the above referenced case:

Warren Lewis, Black, Houston Field Office, Contract

Specialist, GS-11, will testify that, similar to plaintiff, he was a Supervisory GS-11 (Plaintiff was a Supervisory GS-12), supervising 6 people, and now he has lost the title of Supervisory and does not supervise anyone; was denied parking privileges; was required to type his own work product; lost his administrative support; was not allowed to supervise whites; lack of promotion and advancement of blacks in Region 7 of GSA; after testifying in an EEO hearing for Bonestine Johnson, he was given a proposed removal from federal service; he was given a proposed removal from federal service; he was given instructions by management to fire a black because it would look better if he, a black, would do it, and the procedures for firing someone; letters written to Eschbacher regarding workload and administrative support, which went unanswered; he requested training that Eschbacher denied; management took away his duties; management changed ratings of employees rated by Lewis; Eschbacher gave him a letter that he was being terminated; racial statements by management; he received low evaluations.

Don Bradley, Black, Building Manager, GS-11, 23 years of service in GSA, will testify, that, similar to plaintiff, he did supervise 10-14 employees, but after he filed an EEO complaint, he was reassigned and never got his supervisory position back; he met with Casey Bowen to complain that he was discriminated against in terms of workload and responsibilities; in reprisal, he got heavier workload, short suspense times; he did not have proper administrative support; he was never given proper training; he was given low evaluations; statement by management regarding status of blacks in region as well as the white males club at regional office; he was only one in region not to get Field Office upgrade at end

of 1992; he found out that Joe Jones, who was scheduled to be plaintiff's assistant in New Orleans, was sent to Little Rock instead.

Marva Carr, Black, Office Manager, Federal Protection Services, GSA, GS-7, Houston, will testify concerning management statements regarding minority females inability to obtain management positions; preselection of whites for positions in the Houston field office; reprimand given to her by Bowen in August, 1993, in reprisal for an EEO complaint; she was not given a permanent position for a long period of time; just after she wrote a letter about obtaining a permanent position, she was given a proposed removal from federal service, Eschbacher gave her a proposed removal; training denied her; promotion potential denied her.

Bonestine Johnson, Black, Building Funds Clerk, Houston, GS-5, who will testify concerning statements of management regarding blacks; as preparer of the budget, most of the training goes to white employees; no minority supervisors supervise whites; she had to report her whereabouts to her supervisor, when the whites did not have to; she was denied promotions; she heard racial jokes by management.

Wilder Smith, Black, Little Rock. Arkansas who will testify that he had his job eliminated by Casey Bowen after he filed an EEO complaint; Bowen did not follow procedure when he eliminated Smith's job; he worked for plaintiff in Little Rock.

Plaintiff requests that these witnesses all be permitted to testify at trial.

Thank you for your cooperation in this matter.

Sincerely,

/s/ Victor R. Farrugia
Victor R. Farrugia
A Professional Law Corporation

APPENDIX L

December 10, 1991

MEMORANDUM FOR TOMMY L. SWANSON
SUPERVISORY BUILDINGS MANAGEMENT SPECIALIST (7PZ)

FROM: GLENN F. MOORE /s/ Glenn F. Moore
DIRECTOR, FACILITY SUPPORT CENTER

SUBJECT: Annual Leave Charged Due to Tardiness

This letter is to inform you that I am charging you annual leave for your continued unexcused tardiness for the following tines and dates. You continue to ignore my instructions to you to notify me prior to/or upon your arrival at work, when you are going to be late, and the reason for being late. Listed below are the days you were tardy, the times of arrival, and the amount of time being charged in increments.

DATE	TIME OF ARRIVAL	AMOUNT OF TIME BEING CHARGED	INCREMENTS
11/ 4/91	7:52 a.m.	6 minutes	1/10
11/18/91	7:55 a.m.	6 minutes	1/10
11/19/91	8:00 a.m.	12 minutes	2/10
11/20/91	8:01 a.m.	12 minutes	2/10
11/29/91	7:54 a.m.	6 minutes	1/10
12/ 2/91	7:55 a.m.	6 minutes	1/10
12/ 3/91	8:00 a.m.	12 minutes	2/10
12/ 4/91	8:00 a.m.	12 minutes	2/10
12/ 9/91	7:54 a.m.	6 minutes	1/10
12/10/91	8:07 a.m.	18 minutes	3/10

Record of Infraction		See Instructions on Reverse
Name of Employee Tommy L. Swanson	Title Supervisory, Bldg. Mgmt Spec	Grade GS-12
Organization SA, PBS, Facility Support Center	Location New Orleans, LA	

Supervisor's Report

On December 10, 1991, I wrote you about your continued unexcusable tardinesses of November 4, 7:52; November 18, 7:55; November 19, 8:00; November 20, 8:01; November 29, 7:54; December 2, 7:55; December 3, 8:00; December 4, 8:00; December 9, 7:54; December 10, 8:07. On December 12, you arrived at 7:57. I have repeatedly warned you that your continued tardiness may cause disciplinary action and on October 16, 1991, I gave you a "Record of Infraction" for previous unexcused tardinesses. However, you continue to come in late, never inform me of your being late, nor do you call or provide me with an explanation for your tardiness. On December 11, 1991, the Time and Attendance Clerk requested you sign for 1 hour annual leave (a total of several increments of tardinesses), however, you refused. On December 12, 1991, I advised you that if you didn't sign for the annual leave I had no recourse but to charge you as AWOL. You shrugged your shoulders. Therefore, you are being charged AWOL in increments of one-tenth-hour on the days you were tardy. Based on the above information, you are being charged with absense from duty for 1 day or less without permission and without adequate justification; failure to follow instructions for notifying supervisor or

obtaining approval for absence. (includes tardiness of more than 30 minutes and leaving the job without permission). This charge is in accordance with GSA Penalty Guide OAD P 5410.1, Chapter 3, Change 62, Table 1, Item 5.

You have 3 workdays to respond to this charge by completing Section 2 of this form and returning the original to me.

Supervisor (Signature	Title	Date
Glenn F. Moore /s/Glenn F. Moore	Director, Facility Support Center	12-17-91

7. EMPLOYEE'S STATEMENT - I HAVE READ THE ABOVE REPORT AND MAKE THE FOLLOWING COMMENT:

(See Attached 2 page Response)

EMPLOYEE (Signature /s/T L Swanson	12-18-91

3. PREVIOUS INFRACTIONS (Nature of offense, penalty action taken, and date of penalty action)

4. ACTION TAKEN OR RECOMMENDED (Give reasons for any deviations from Penalty Guide

SUPERVISOR (Signature)	TITLE	DATE

5. ACTION TAKEN OR RECOMMENDED (include any appropriate comments)

HIGHER LEVEL SUPERVISOR (Signature)	TITLE	DATE

GENERAL SERVICES ADMINISTRATION GSA FORM 225 (6-62)

November 18, 1991

FROM: TOMMY L. SWANSON /s/ T L Swanson
SUPERVISORY, BUILDINGS MANAGEMENT SPECIALIST

SUBJECT: RESPONSE TO 12/17/91 RECORD OF INFRACTION FOR ALLEGED TARDINESS

In response to the December 17, 1991 Letter of Infraction given to me by my supervisor Glenn Moore, Director - New Orleans Facility Support Center, I make the following statements.

On December 10, 1991 Edith Snow, Glenn Moore's secretary, placed a memorandum on my desk that indicated a long list of days and time of arrivals in support of Glenn Moore's allegations of tardiness on my part. This was the first and only notice I was given that anyone including my supervisor was under the impression that I was tardy for duty on any of the days mentioned. Even more troubling, in addition to the feeling of a total disregard for my position as a supervisor, a manager, an employee, and as an individual was what appears to be a loss of entitlement to a common courtesy of informal discussion to clarify possible misconceptions or an opportunity to address a suspected infraction at the time of it's discovery. I am left with the "I got you" or "Aha, I caught you" feeling in the attitude of my supervisor.

Due to the time lapse it is extremely difficult for me to remember the events that could have lead to such misconceptions. This adds to the frustration of these allegations because fairness to me has been denied for properly addressing each date given.

However, I can remember on several occasions being stopped by tenants who recognized me as a GSA employee on my way to the office and requested my assistance in resolving problems they were experiencing in their space (i.e. not enough air or too hot or too cold, where can I find certain agencies? Etc.).

This is normal and is expected. It is also required that I respond accordingly as a representative of GSA as stated in the GSA Strategic Plan and GSA Administrator, Richard Austin. During those times I was working regardless of my location and did not consider myself tardy by any stretch of the imagination.

Other instances I can remember is after being hospitalized for a week (i.e. 11/11/91 thru 11/16/91) the first days of my return to work was met with concerned coworkers who would stop me in our hallway enroute to my office to express their feelings and share their similar experiences with family members. These coworkers include Elvera Pigg, Ricky Crawford, L. J. Bourgeois and others. While this may have created a delay in the actual time Glenn Moore actually saw me, I did not consider myself tardy for work.

What is even more evident is that it appears that it was not enough for Glenn Moore to express his lack of regard for me by not making any attempt to contact me during my hospital stay or to even acknowledge me when I returned to work nor express any interest in my health thereafter, but according to his days listed as tardy, my first three days back (i.e. 11/18/91, 11/19/91, and 11/20/91) are included. It appears that while everyone else was concerned about me and my health, Glenn Moore could only think of malicious ways of doing me harm.

Finally, I have attached a copy of a delegation of authority memo by Glenn Moore that proves that Glenn Moore was not even available or present during at least two of the days I have been accused of tardiness (i.e. 12/3/91 and 12/4/91). My supervisor was not at work those days, no one acting in his capacity has ever mentioned the incidents to me, and I am still convinced that I did not have a problem tardiness on those days.

In conclusion, I must reassert my position not to sign a leave statement for time charged against me in such an unfair manner. In the past, Glenn Moore has arbitrarily taken my annual leave without my consent nor an application for leave. This was wrong and I am requesting reinstatement of that leave. For some reason I am not being treated fairly and I am being mandated to agree with an injustice against me. Even the slightest of bodily gestures is being interpreted adversely in this infraction. Why am I being scrutinized so microscopically? No one else is !!!

Well enough is enough, if Glenn Moore feels that I should pay for his unsubstantiated charges against me and administered in the most unfair manner imaginable then it will be done without my support or concurrence to such charges and such a process.

I did not believe that I was tardy on the days indicated, that is why I did not approach Glenn Moore with a reason for such tardiness as he has stated in this Record of Infraction.

(SEE ATTACHMENTS)

APPENDIX M

General Services Administration, Region 7
819 Taylor Street
Fort Worth, TX 76102

April 1, 1992

MEMORANDUM FOR TOMMY SWANSON
SUPERVISORY BUILDING
MANAGEMENT SPECIALIST
(7PM-3-NO)

FROM: GLENN F. MOORE /s/Glenn Moore
REAL PROPERTY OFFICER
(7PM-3-NO)

THRU: JAMES K. MARSHALL
/s/ James K. Marshall
DISTRICT MANAGER (7PMD-3)
4-1-92

SUBJECT: Parking in Hale Boggs Federal Building Garage

Your request for a parking space in the Hale Boggs Federal Building basement garage has been considered and is denied. We have agency requirements for the available parking spaces. I am withdrawing the spaces assigned to Ms. Elvera Pigg (GS-12) and Mr. Ed Wortmann (GS-12) effective April 17, 1992. Parking spaces will remain assigned to Mr. Tom Sarver, Buildings Manager (GM-13); Mr. Ron Snow, Supervisory Realty Specialist (GM-13); and myself, Real Property Officer (GM-14).

APPENDIX N

MEMORANDUM FOR GLENN MOORE
REAL PROPERTY OFFICER
(7PM-3-NO)

FROM: TOMMY L. SWANSON
/s/ T.Swenson
SUPERVISORY, BUILDING
MANAGEMENT SPECIALIST

SUBJECT: Official Misconduct and Civil Rights Violations

I have just received another misleading and inaccurate correspondence from you on this first day of myreturn from two weeks of annual leave. This one is concerning my using five hours of annual leave approved by you orally over the telephone as my attorney and I discovered that my lunch period would not be sufficient time to prepare for the next days' trial.

Unfortunately, this memo must be developed and processed in order to correct your ongoing malicious acts of drafting another erroneous correspondence that is intentionally misleading and untrue. The following statements represent your misleading statements verses the acual facts.

1. Statement: At approximately 11:00 am on April 21, 1992 Lee Crook called my attorney. He wastold at that time that I was present in his office; otherwise you would never have known I had left the office.

FACT: You and Mr. Crook were meeting behind closed doors. Larry Moore and I were the only employees available. I told Larry of my meeting and that I was taking an early lunch. I am also told that Larry informed you and Debra Mazant of my whereabouts at the same time. Additionally, I had written LUNCH next to my name on the sign out board.

2. Statement: You have instructed me repeatedly, both orally and in writing to use the sign out board when departing the office.

FACT: I had written LUNCH next to my name on the sign out board. The truth of the matter is, I am the only employee under you required to endure scrutiny and the only one to bother to use the board. You simply choose not to recognize the truth.

3. Statement: I continue to show a total disregard for obtaining prior approval when requesting official time and/or annual leave to conduct my business ..... and again departed without obtaining prior approval.

FACT: Upon discovering that my meeting could last longer than my lunch period I called you immediately. I made you aware of the circumstances and requested official time since it involved the EEOC Process. Your response was "are you talking annual leave?" I then stated that "only if official time was not available" You then said "OK" and the conversation ended.

Until this first day of my return there was no indication that there was a problem even though we have met and spoken on several occasions before my leave began.

As my supervisor it is indeed unfortunate that you feel it necessary to display such character that can be so easly viewed as totally void of fairness. Such a position demand at least the common ground of a feeling of fairness. This is not the impression you have left with me nor am I pleased with the ongoing acts of harassment by you.

For these reasons and other similar acts I am notifying you and GSA of charges of Official Misconduct and Civil Rights Violations that I plan to file against you and prosecute to the full extent of the law both internally, Federal Court, and in civil courts.

APPENDIX O

General Services Administration, Region 7
819 Taylor Street
Fort Worth, TX 76102

May 12, 1992

MEMORANDUM FOR TOMMY L. SWANSON (7pm-3-NL)

FROM: EARL W. ESCHBACHER, JR.
/s/Earl W. Eschbacker, Jr.
ASSISTANT REGIONAL
ADMINISTRATOR
PUBLIC BUILDINGS SERVICE (7P)

SUBJECT: Directed Reassignment

Due to the reorganization of the New Orleans Facility Support Center to an Enhanced Field Office, the workload no longer supports the Supervisory Building Management Specialist position which you occupy. Therefore, it is management's determination that you occupy. Therefore, it is management's reassigned to the Real Property Management and Safety Division, Facility Management Branch, Fort Worth, Texas. You will report to that assignment on August 3, 1992.

The duties and responsibilities of the assignment will be as Building Management Specialist, GS-1176-12. Because of the differences in the organizational structures, when the position is moved to Fort Worth, it will no longer be a supervisory position. However, this will not affect your grade or pay.

You must notify me of your acceptance or declination of this directed reassignment by indicating your decision with your signature in the appropriate block below and returning the original of this memorandum to me within 7 days of your receipt.

If you choose to accept the reassignment, your moving expenses will be paid by GSA in accordance with law and regulation.

Failure to accept this directed reassignment or to respond within 7 days of your receipt of this notice may result in removal from your position and from the Federal service on August 3, 1992, in accordance with 5 U.S.C. 7543.

If you have any questions concerning the reasons for this action, your rights, or procedures, contact Kathy Wyche, Employee Relations Specialist (7CPP), telephone FTS 334-3638.

ACCEPTANCE: (Accepted under protest)

I hereby accept the directed reassignment to Fort Worth, Texas.

/s/ F. Swanson

SIGNATURE

5/15/92

DATE

DECLINATION:

I hereby decline to accept the directed reassignment to Fort Worth, Texas.

_____

SIGNATURE

_____

DATE

Supreme Court, U.S.
FILED
SEP 24 1997
CLERK

(2)

No. 97-163

In the Supreme Court of the United States

OCTOBER TERM, 1996

TOMMY L. SWANSON, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION,
ROGER W. JOHNSON, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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8 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner presented insufficient evidence of race discrimination or retaliation to sustain a jury verdict in his favor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 110 F.3d 1180. The opinion of the district court (Pet. App. A32-A33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1997. The petition for a writ of certiorari was filed on July 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an African-American man who was employed as a Supervisory Building Management Specialist at a New Orleans, Louisiana, office of the General Services Administration (GSA) from October 1988 to May 1992. He filed this Title VII suit in March 1994, alleging race discrimination and retaliation for his having filed Equal Employment Opportunity (EEO) complaints. Pet. App. A8-A9.

Because petitioner alleged discrimination and retaliation occurring both before and after the effective date of the Civil Rights Act of 1991, the claims arising prior to that date were tried to the district court, while those arising after that date were tried to the jury. Pet. App. A9; see 42 U.S.C. 1981a(c)(1). The court found for GSA on all of the pre-Act claims. Pet. App. A10.

In his claims arising after the 1991 Act, petitioner alleged that GSA had discriminated or retaliated against him by, among other things, denying him parking privileges, disciplining him for tardiness, reducing his supervisory responsibilities, and reassigning him to an office in Fort Worth, Texas. Pet. App. A10. The jury returned a verdict for petitioner on those claims. *Ibid.* The district court denied GSA's post-trial motion for judgment as a matter of law. *Id.* at A32-A33.

The court of appeals reversed. Pet. App. A1-A30. Applying this Court's decision in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993), the court held that petitioner had failed to satisfy his ultimate burden of proving that GSA had discriminated or retaliated against him. Pet. App. A12-A13. Specifically, the court concluded that petitioner had

"simply offered no evidence that tends to disprove GSA's non-discriminatory explanations" for its challenged actions, or that "otherwise connects the adverse actions in question to [petitioner's] race or his filing of EEO complaints." *Id.* at A13. Petitioner had not demonstrated that similarly situated white employees had been treated differently. See *id.* at A14, A15, A17, A20-A21, A22-A23. Nor had he presented any other facts—as opposed to mere "conclusory opinion[s]" of lay witnesses—to establish that he had been the victim of race discrimination or retaliation. *Id.* at A18; see *id.* at A15-A16, A20, A23.

Judge Dennis concurred in part and dissented in part. Pet. App. A25-A30. He agreed that the jury's verdict could not be sustained on the claims relating to petitioner's loss of supervisory responsibilities and reassignment to Fort Worth. *Id.* at A28. He would have upheld the jury's verdict, however, on petitioner's remaining claims. *Id.* at A27-28.

ARGUMENT

The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. The decision turns entirely on the facts of this case and raises no issue warranting review by this Court.

1. Petitioner first contends (Pet. 11) that the court of appeals' decision is somehow "in conflict" with *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993). He is mistaken. The court of appeals expressly followed *St. Mary's Honor Center* with regard to petitioner's burden of proof in this Title VII case. See Pet. App. A12-A13. Petitioner appears to be relying on statements in the Court's opinion that a plaintiff may be able to prevail on a Title VII claim by proving

the elements of a prima facie case and the falsity of the defendant's asserted non-discriminatory explanations for its actions. See 509 U.S. at 511. But nothing in the Court's opinion suggests that a plaintiff may adequately refute the defendant's explanations by offering nothing more than conclusory assertions unsupported by facts. That is all that the court of appeals held here. See Pet. App. A15-A16, A18, A20-A21, A23.

2. Petitioner does not contend that the decision below conflicts with the decision of any other circuit. He merely asserts (Pet. 12-13) that the court of appeals failed to follow its own precedents regarding the standard of review of jury verdicts. But intra-circuit conflicts, even where they exist, need not concern this Court. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). No such conflict exists here. The court of appeals applied the very standard advocated by petitioner in assessing whether the jury verdict could be sustained. Compare Pet. 12 with Pet. App. A13.[1]

3. Petitioner's only remaining argument is that "the evidence supported the jury verdict" on each of his claims. See Pet. 14-21. This Court does not grant certiorari, however, "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S.

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[1] Petitioner offers no authority or logic for his passing assertion (Pet. 13) that a court violates "the separation of powers" by overturning a jury verdict under a statute that provides for a right to jury trial. The federal courts' authority, indeed obligation, to overturn civil jury verdicts not supported by the evidence is too firmly established and universally accepted to warrant further discussion. See *St. Mary's Honor Center*, 509 U.S. at 524 (contemplating review of jury verdicts in Title VII cases).

220, 227 (1925). The court of appeals' own review of the evidence was careful and thorough. Indeed, petitioner himself concedes (Pet. 13) that this is "a close case" as to whether the evidence was sufficient to sustain the jury's verdict.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
JENNIFER H. ZACKS
Attorneys

SEPTEMBER 1997

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[2] In fact, the record amply supports the court of appeals' conclusion that there was no evidence that GSA's challenged actions were the product of racial discrimination or retaliation. First, the parking spaces were available only to those employees who, unlike petitioner, were branch chiefs or were at or above the GS-13 level. See Pet. App. A16-A17. Second, petitioner was disciplined for tardiness only after he had been repeatedly late to work. See *id.* at A7, A14. Finally, both petitioner's loss of supervisory authority and his subsequent reassignment were part of an overall office downsizing. See *id.* at A5, A8, A19-A22.